



**SHAREN WILSON**  
Criminal District Attorney  
Tarrant County

PD-0881-20  
COURT OF CRIMINAL APPEALS  
AUSTIN, TEXAS  
Transmitted 12/4/2020 3:42 PM  
Accepted 12/8/2020 11:22 AM  
DEANA WILLIAMSON  
CLERK

FILED  
COURT OF CRIMINAL APPEALS  
12/8/2020  
DEANA WILLIAMSON, CLERK

December 4, 2020

Hon. Deana Williamson, Clerk  
Court of Criminal Appeals  
P.O. Box 12308  
Austin, Texas 78711

**Re: Crystal Mason v. The State of Texas, No. PD-0881-20**  
**Letter Reply to Appellant's Petition for Discretionary Review**

Dear Ms. Williamson:

This letter is in response to the petition for discretionary review filed with this Court on December 1, 2020. The State previously addressed the issues presented in its response to Appellant's motion for en banc reconsideration filed in the lower court. *See* Appendix A, State's Response to Appellant's Motion for En Banc Reconsideration, No. 02-18-00138-CR, attached hereto and incorporated herein. For the reasons stated in the attached response, the State believes that the lower court of appeals correctly set out the facts and substantive law in its opinion below and correctly analyzed the case. *See id.* Therefore, the State will not file any further reply unless this Court grants Appellant's petition. Finally, if review is granted, the State avers that oral argument would not assist the Court in resolving the issues presented. However, the State requests that it be allowed to respond to any oral argument presented by Appellant.

Respectfully submitted,

SHAREN WILSON  
CRIMINAL DISTRICT ATTORNEY  
TARRANT COUNTY, TEXAS

JOSEPH W. SPENCE  
Assistant Criminal District Attorney  
Chief, Post-Conviction

/s/ Helena F. Faulkner  
HELENA F. FAULKNER  
Assistant Criminal District Attorney  
State Bar No. 06855600  
[ccaappellatealerts@tarrantcountytexas.gov](mailto:ccaappellatealerts@tarrantcountytexas.gov)

cc: Thomas Buser-Clancy, [tbuser-clancy@aclutx.org](mailto:tbuser-clancy@aclutx.org)

Andre Ivan Segura, [asegura@aclutx.org](mailto:asegura@aclutx.org)

Savannah Kumar, [skumar@aclutx.org](mailto:skumar@aclutx.org);

Alison Grinter, [alisingrinter@gmail.com](mailto:alisingrinter@gmail.com)

Emma Hilbert, [emma@texascivilrightsproject.org](mailto:emma@texascivilrightsproject.org)

Hani Mirza, [hani@texascivilrightsproject.org](mailto:hani@texascivilrightsproject.org)

Sophia Lin Lakin, [slakin@aclu.org](mailto:slakin@aclu.org)

Dale E. Ho, [dho@aclu.org](mailto:dho@aclu.org)

Kim T. Cole, [kcole@kcolelaw.com](mailto:kcole@kcolelaw.com).

## **APPENDIX A**

**State's Response to Appellant's Motion  
for En Banc Reconsideration  
No. 02-18-00138-CR**

IN THE COURT OF APPEALS FOR THE  
SECOND DISTRICT OF TEXAS

CRYSTAL MASON,  
APPELLANT

V.

THE STATE OF TEXAS,  
APPELLEE

§  
§  
§  
§  
§  
§  
§

NO. 02-18-00138-CR

**STATE’S RESPONSE TO APPELLANT’S MOTION  
FOR EN BANC RECONSIDERATION**

TO THE HONORABLE COURT OF APPEALS:

COMES NOW the State of Texas and, pursuant to this Court’s June 16, 2020, letter request, files its Response to Appellant’s Motion for En Banc Reconsideration of this Court’s panel opinion affirming Appellant’s illegal-voting conviction. *See Mason v. State*, 598 S.W.3d 755 (Tex. App.—Fort Worth 2020, no pet. h.). Appellant seeks en banc reconsideration of the panel’s holdings that: (1) the State was required to prove only that she knew of the circumstance rendering her ineligible to vote and was not required to prove her actual knowledge of her ineligibility; (2) the verb “vote” in section 64.012(a)(1) of the Texas Election Code includes casting an uncounted provisional ballot; and (3) the Help America Vote Act (HAVA) does not preempt section 64.012(a)(1).

## **I. The Election Code**

Convicted felons are prohibited from voting, subject to such exceptions as the Legislature may make. TEX. CONST. art. VI, § 1(a)(3). A person convicted of a felony may be re-enfranchised if she has “fully discharged [her] sentence, including any term of incarceration, parole, or supervision, or completed a period of supervision ordered by any court.” *Id.* § 11.022(a)(4)(A). A person commits an offense if she “votes or attempts to vote in an election in which [she] knows [she] is not eligible to vote.” *Id.* § 64.012(a)(1).

## **II. The Evidence Is Sufficient to Prove Appellant Knew She Was Ineligible to Vote**

Appellant challenges this Court’s holding that she did not have to actually know of her ineligibility to vote or that voting while having that ineligibility was illegal; rather, this Court held, the State was required only to prove that she knew of the circumstance that rendered her ineligible to vote. *See* Motion at 4-11; *Mason*, 598 S.W.3d at 767-71. She alleges that: (1) this Court’s opinion conflicts with *Delay v. State*, 465 S.W.3d 232 (Tex. Crim. App. 2014); (2) *Delay* controls over the opinion’s cited authority; (3) the opinion conflicts with precedent interpreting similar *mens rea* requirements; and (4) the grounds for the decision impermissibly reached beyond the State’s position. *See* Motion at 4-11.

### **A. Precedent Cited by This Court Controls**

Relying on precedent dating back to 1888, this Court correctly concluded that “the State need only show beyond a reasonable doubt that the defendant voted while knowing of the condition that made the defendant ineligible; the State does not have to prove that the defendant subjectively knew that voting with that condition made the defendant ineligible to vote under the law or that to vote while having that ineligibility is a crime.” *Mason*, 598 S.W.3d at 768-69 (footnote omitted) (citing *Thompson v. State*, 9 S.W. 486, 486-87 (Tex. Ct. App. 1888);<sup>1</sup> *Jenkins v. State*, 468 S.W.3d 656, 672-73 (Tex. App.—Houston [14th Dist.] 2015), *pet. dismiss’d, improvidently granted*, 520 S.W.3d 616 (Tex. Crim. App. 2017) (per curiam); *Medrano v. State*, 421 S.W.3d 869, 884-85 (Tex. App.—Dallas, *pet. ref’d*)). These cases refer to and are consistent with the premise that ignorance of the law is no excuse. *See Thompson*, 9 S.W. at 486-87; *Jenkins*, 468 S.W.3d at 672-73; *Medrano*, 421 S.W.3d at 884-85; *see also* TEX. PENAL CODE § 8.03(a) (no defense to prosecution that actor ignorant of any law after it takes effect).

Appellant argues that this Court’s holding is impermissible because the State did not advance the arguments supporting it on appeal. *See* Motion at 10-11. This

---

<sup>1</sup> Texas Court of Appeals’ opinions are binding on this Court, as it was the highest court with criminal jurisdiction before creation of the Texas Court of Criminal Appeals. *Mason*, 598 S.W.3d at 768 n.11.

Court has no authority to disregard binding precedent such as *Thompson*. See *Hailey v. State*, 413 S.W.3d 457, 489 (Tex. App.—Fort Worth 2012, pet. ref’d) (“This court is bound by, and has no authority to disregard or overrule, the precedent of the court of criminal appeals); see also *Mason*, 598 S.W.3d at 768 n.11. Moreover, an appellate court can affirm a trial court’s judgment if it is correct on any theory of law applicable to the case. See, e.g., *Valtierra v. State*, 310 S.W.3d 442, 447-48 (Tex. Crim. App. 2010) (appellate court “will sustain the trial court’s ruling if that ruling is ‘reasonably supported by the record and is correct on any theory of law applicable to the case’”); *Martinez v. State*, 74 S.W.3d 19, 21 (Tex. Crim. App. 2002) (court of appeals may properly affirm denial of hearing on motion for new trial on basis not raised by State). Appellant cites *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020), where the Ninth Circuit’s “radical transformation” of the issues went “well beyond the pale.” *Id.* at 1581-82. This Court’s opinion does no such thing.

Applying the binding principles cited by this Court, the evidence proved beyond a reasonable doubt that Appellant knew she was a convicted felon who was still on supervised release when she cast her provisional ballot; that is, Appellant knew of the condition that made her ineligible to vote. *Mason*, 598 S.W.3d at 770-71.

## **B. *Delay* Is Inapposite**

Appellant argues that *Delay* abrogates *Thompson*, *Jenkins*, and *Medrano* and requires Appellant to know not only the underlying circumstances of her ineligibility but also to *actually realize* that her conduct violated the Election Code. *See* Motion at 8-9 & n.2. This Court addressed and distinguished *Delay* from the case at bar. *See Mason*, 598 S.W.3d at 769 n.12.

The *Delay* Court resolved an ambiguity in section 253.003(a) of the Texas Election Code caused by the placement of “knowingly” before both the *actus-reas* verb and the following clause describing the *actus reas*. *See Mason*, 598 S.W.3d at 769 n.12; *see also* TEX. ELEC. CODE § 253.003(a) (“A person may not knowingly make a political contribution in violation of this chapter”). By contrast, the placement of “knows” after the *actus-reas* verb and immediately before the description of the attendant circumstances in section 64.012(a)(1) creates no ambiguity. *See Mason*, 598 S.W.3d at 769 n.12; *see also* TEX. ELEC. CODE § 64.012(a)(1) (person commits offense if she “votes or attempts to vote in an election in which [she] knows [she] is not eligible”). As this Court concluded here: “[W]hat ‘knows’ was intended to describe in Section 64.012(a)(1) is not ambiguous, as was the word placement in the statutes at issue in *Delay*.” *Mason*, 598 S.W.3d at 769 n.12. Thus, *Delay* does not control the construction of “knows” in section

64.012(a)(1), and it does not require this Court to depart from *Thompson*, *Jenkins*, and *Medrano*.

**C. The Opinion Does Not Conflict With Other Cases’ *Mens Rea* Interpretations**

Appellant asserts that this Court’s interpretation of “knows” in section 64.012(a)(1) conflicts with the United States Supreme Court’s and the Texas Court of Criminal Appeals’ interpretations of similar *mens rea* requirements. *See* Motion at 9-10 (citing *Rehaif v. United States*, 139 S. Ct. 2191 (2019); *Ross v. State*, 543 S.W.3d 227 (Tex. Crim. App. 2018); *State v. Edmond*, 993 S.W.2d 120 (Tex. Crim. App. 1996)). However, the cases she cites do not require a different result than this Court reached.

In *Ross* and *Edmond*, the Court of Criminal Appeals dealt with ambiguities in the *mens rea* requirement in the Texas Penal Code’s official-oppression statute. *Ross*, 543 S.W.3d at 234-35 (placement of “knows” in statute required State to prove Ross knew search and seizure unlawful; State failed to meet burden); *Edmond*, 933 S.W.2d at 124-27 (“knows is unlawful” modified “mistreatment,” meaning a defendant must mistreat someone and know his conduct is criminal or tortious). The Supreme Court in *Rehaif* interpreted the federal firearm-possession statute to mean that “knowingly” applied both to the defendant’s conduct (firearm possession) and his relevant status (an alien unlawfully in the country) when he possessed the

firearm.<sup>2</sup> *Rehaif*, 139 S. Ct. at 2194; *see* 18 U.S.C.A. §§ 922(g) (it “shall be unlawful for any person . . . , being an alien . . . illegally or unlawfully in the United States,” to “possess in or affecting commerce, any firearm or ammunition”), 924(a)(2) (“Whoever knowingly violates” § 922(g) subject to penalties of up to 10 years’ imprisonment). Nothing in these opinions’ interpretations of the placement of “knows” or “knowingly” – especially in statutory provisions with different grammatical constructions than section 64.012(a)(1) – would merit this Court failing to follow or attempting to distinguish the on-point precedent of *Thompson*, *Jenkins*, and *Medrano*.

#### **D. The State Proved Appellant Knew of Her Ineligibility**

Alternatively, were this Court to require the State to prove beyond a reasonable doubt that Appellant actually knew of her ineligibility to vote, and not just of her status rendering her conduct illegal, the State met its burden. A person acts knowingly with respect to the nature of her conduct or to circumstances surrounding her conduct when she is aware of the nature of her conduct or that the circumstances exist or if she is aware that her conduct is reasonably certain to cause

---

<sup>2</sup> The Supreme Court’s interpretation that knowingly applied to Rehaif’s knowledge of his status as an alien in the country illegally – the element that rendered his firearm possession criminal – appears consistent with this Court’s holding that the State was required to prove Appellant’s knowledge of her status as a convicted felon on supervised release – the element that rendered her voting criminal.

the result. TEX. PENAL CODE § 6.03(b). Evidence of knowledge is almost always proven through circumstantial evidence. *Herrera v. State*, 526 S.W.3d 800, 809 (Tex. App.—Houston [1st Dist.] 2017, pet. ref'd). Knowledge may be inferred from any facts tending to prove its existence, including the accused's acts, words, and conduct. *Hart v. State*, 89 S.W.3d 61, 64 (Tex. Crim. App. 2002) (citing *Manrique v. State*, 994 S.W.2d 640, 649 (Tex.Crim.App.1999)).

The overwhelming favorable evidence was legally sufficient to prove Appellant's knowledge of her ineligibility to vote:

- Appellant knew that she was a convicted felon on supervised release when she voted on November 8, 2016. RR 2: 19-21, 108, 110, 113.
- Election judge Karl Dietrich and Appellant sat at a table and actually read through each part of the provisional envelope. RR 2: 67.
- Dietrich gave Appellant the provisional envelope and told her to read and fill out the section entitled "To be completed by the voter." RR 2: 64, 67-68; S-X 9.
- Dietrich could not say with certainty that Appellant actually read the information, but "she certainly paused and took some number of seconds to look over what was on the left. And she certainly read the right part, and she filled it out since she put the right information in the boxes." RR 2: 71.
- Appellant responded affirmatively when Dietrich held up his right hand and asked if Appellant affirmed that all the information she provided was accurate. RR 2: 71-72.
- Dietrich testified that he would not have let Appellant affirm to the affidavit had she appeared not to have read it. RR 2: 74, 89.

- Dietrich did not believe it was possible that Appellant did not review the affidavit's language; he saw her distinctly pause while reading or appearing to read the form. RR 2: 75-76, 86, 89.
- Poll clerk Jarrod Streibich, who was four to five feet away from Dietrich and Appellant when they worked on Appellant's provisional ballot, saw Appellant read the provisional ballot affidavit. RR 2: 102. He saw "[h]er finger watching each line making sure she read it all. RR 2: 102.
- On cross-examination, Appellant agreed that the Affidavit of Provisional Voter that she completed and executed on November 8, 2016, makes it clear that a felon who is on supervised release is not eligible to vote and that it is a second-degree felony to vote in an election in which a person knows she is not eligible. RR 2: 144-45, 150-51.

## **E. Conclusion**

This Court's holding that the State was required to prove beyond a reasonable doubt that Appellant voted while knowing of the condition that made her ineligible is supported by the unambiguous plain language of section 64.012(a)(1) of the Texas Election Code and by long-standing case law directly on point. The favorable evidence is legally sufficient to prove that Appellant voted in the November 8, 2016, election knowing that she was a convicted felon on supervised release. Appellant's arguments in her motion for en banc reconsideration do not require a different result from the one this Court reached.

### **III. The Evidence Is Sufficient to Prove Appellant Voted in an Election**

Appellant challenges this Court’s definition of the verb “vote” in section 64.012(a)(1) to include casting a rejected provisional ballot.<sup>3</sup> *See* Motion at 11-15; *see also Mason*, 598 S.W.3d at 774-75. She alleges that the Court’s opinion: (1) failed to acknowledge ambiguity in the verb “vote” that must be resolved in her favor; (2) adopted a definition of the verb “vote” that leads to illogical results; and (3) rendered superfluous the “attempt to vote” language of section 64.012(a)(1). *See* Motion at 11-15.

#### **A. This Court Appropriately Defined the Verb “Vote” in Accordance With Its Common Meaning**

The definition of the verb “vote” adopted by this Court is wholly consistent with the well-established statutory-construction principle that words not particularly defined by statute are to be given the meaning found in their “common usage.” TEX. GOV’T CODE § 311.001. It is appropriate to consult standard dictionaries to construe the ordinary meaning of an undefined statutory term, “and jurors may . . . freely read

---

<sup>3</sup> Appellant asserts that the rule of lenity requires this Court to define the verb “vote” to exclude uncounted provisional ballots if the individual *mistakenly* believed she was eligible to vote. *See* Motion at 2-3, 14. But even Appellant’s interpretation of the verb “vote” does not excuse her conduct because the State proved, and the trial court found, beyond a reasonable doubt that she *did know* she was ineligible to vote but did so anyway as proscribed by section 64.012(a)(1).

statutory language to have any meaning which is acceptable in common parlance.”<sup>4</sup> *Stahmann v. State*, \_\_ S.W.3d \_\_, 2020 WL 1934894 at \*8 (Tex. Crim. App. April 22, 2020). This is exactly what this Court did in reviewing a number of common definitions from various sources before deciding that “to cast or deposit a ballot — to vote — can be broadly defined as expressing one’s choice, regardless of whether the vote actually is counted.” *Mason*, 598 S.W.3d at 775 (footnote omitted); *see Stahmann*, 2020 WL 1934894 at \* 8 (consulting standard dictionaries to construe undefined statutory term’s ordinary meaning is appropriate).

Appellant asserts that this Court erroneously equated “vote” with “cast” a provisional ballot. She points to Election Code sections using the verb “cast” in referring to provisional ballots as dictating a conclusion that an uncounted provisional ballot like the one she cast is not a vote. *See* Motion at 12-14 (citing TEX. ELEC. CODE §§ 63.011 (establishing requirements for when a person “may cast a provisional ballot”), 65.059 (titled “Notice to Provisional Voter” and requiring system for “a person who casts a provisional ballot” to determine if ballot counted (emphasis added))). However, these provisions contain no language requiring the verb “vote” in section 64.012(a)(1) to include only tallied ballots. *See* TEX. ELEC. CODE §§ 63.011, 65.059. Interestingly, HAVA itself uses the term “vote” in allowing

---

<sup>4</sup> Although Appellant elected a bench trial, there is no reason not to allow the trial court, as factfinder, to ascribe “any meaning which is acceptable in common parlance” to the verb “vote” in section 64.012(a)(1).

a person who cast a provisional ballot to determine whether her “vote” was counted and the reason if it was not. *See* 52 U.S.C.A. § 21082(a)(5)(B) (election officials shall establish free access system “that any individual who casts a provisional ballot may access to discover *whether the vote of that individual was counted*, and, *if the vote was not counted, the reason that the vote was not counted*” (emphasis added)).

Appellant argues that, because the Legislature used “vote” in one part of the Election Code and “cast a ballot” in other sections, this Court must presume that different meanings were intended. *See* Motion at 13 (citing *Liverman v. State*, 447 S.W.3d 889, 891 (Tex. App.—Fort Worth 2014), *aff’d*, 470 S.W.3d 831 (Tex. Crim. App. 2015)). *Liverman*, cited by Appellant, is distinguishable because it dealt with different language defining different manners and means of committing the same offense (*i.e.*, “file or record” and “sign or execute”). *Id.* at 890 (dealing with TEX. PENAL CODE § 32.46(a)(1)&(2)). This Court rejected the State’s attempt to interchange subsection (1)’s “sign or execute” with subsection (2)’s “file or record” *Id.* at 892. Here, as this Court held, casting a provisional ballot is voting. *Mason*, 598 S.W.3d at 774-75. Unlike the language at issue in *Liverman* defining ways to commit the same offense, there is no impediment here to interpreting synonymous terms (“vote” and “cast a ballot”) interchangeably.

Appellant further argues that sections 2.002(a) and 2.011 of the Election Code, which use the noun “vote” in the context of determining an election’s winner

or the need for a runoff, mandate interpreting the verb “vote” in section 64.012(a)(1) to include only counted provisional ballots. *See* Motion at 12 (citing TEX. ELEC. CODE §§ 2.002(a) (if two or more candidates tie for number of votes to be elected, second election to fill office shall be held); 2.011 (to be elected to public office, candidate must receive more votes than any other candidate)). Appellant cites *Stubbs v. State*, 502 S.W.3d 218, 236 (Tex. App.—Houston [1st Dist.] 2016, pet. ref’d), which does not support the position she advocates. *See* Motion at 12 n.3. The *Stubbs* Court, tasked with resolving a vagueness challenge to a statutorily-defined term in section 1.07(a) of the Texas Penal Code, referred to subsection (b), which states that “[t]he definition of a term in this code applies to each grammatical variation of the term.” *Id.* (citing TEX. PENAL CODE § 1.07(b)). Here, however, “vote” is not statutorily defined, *Mason*, 598 S.W.3d at 774, and neither section 1.07(b) nor *Stubbs*’ reliance on it applies. Use of the noun “vote” in the cited sections dealing with procedures in a timeframe after votes have been tallied does not prevent interpreting the verb “vote” in section 64.012(a)(1) to cover timeframes preceding the counting of votes.

### **B. Appellant’s Interpretation Leads to Illogical Results**

Appellant’s interpretation of the verb “vote” in section 64.012(a)(1) allows someone who casts a provisional ballot when she *knows* she is ineligible to vote to escape criminal consequence if voting officials discover her ineligibility in time to

prevent her vote from being tallied. Surely this is an absurd result not intended by the Legislature. *See Ex parte White*, 400 S.W.3d 92, 93 (Tex. Crim. App. 2013) (courts construe statutory words in accordance with plain meaning unless construction leads to absurd results Legislature could not have intended). Appellant's interpretation of the verb "vote" is contrary to the language of section 64.012(a)(1), which criminalizes the conduct of voting under enumerated circumstances rather than the result of having a vote be counted in an election's results. *See* TEX. ELEC. CODE § 64.012(a)(1). Moreover, if the casting of a provisional ballot by a person who knows she is ineligible to vote is not to be punished, there would be no point in requiring a warning for provisional ballots, a warning that Appellant admitted at trial was clear about her own ineligibility to vote. RR 2: 144-45, 150-51; *see* 52 U.S.C.A. § 21082(a)(2)(A), (B) (individual permitted to cast provisional ballot upon execution of written affirmation before election official stating she is registered voter in the jurisdiction and "eligible to vote in that election"); TEX. ELEC. CODE §§ 63.011(b-1) (secretary of state shall provide form of affidavit for provisional ballots), 124.006 (secretary of state shall prescribe form of provisional ballot and necessary procedures to implement casting provisional ballot as described by § 63.011); *see also* S-X 8, 9 (containing warnings about eligibility to vote and criminal consequences for illegally voting as prescribed by secretary of state pursuant to § 63.001).

**C. The Opinion Does Not Render the “Attempt to Vote”  
Language of Section 64.012(a)(1) Superfluous**

Appellant asserts that this Court’s opinion renders the “attempt to vote” language of section 64.012(a)(1) superfluous if a vote need not be counted. *See* Motion at 15. Section 64.012(a)(1) creates separate criminal offenses for conduct amounting to voting and conduct amounting to attempting to vote. *See* TEX. ELEC. CODE § 64.012(a)(1). Appellant cites no authority, and the State has found none, to require holding that voting illegally is an attempted offense until such time as the cast provisional ballot is tallied. *See* Motion at 15. Appellant went beyond an attempt and actually voted when she completed every step necessary on her part to cast her provisional ballot expressing her preferences in the election on November 8, 2016 – Dietrich gave Appellant a PIN that allowed her to go into a voting booth and to vote for the candidates on the ballot in that precinct, and the provisional ballots from the polling station were placed in a special bag and submitted to the tally station where all other ballots from the county were collected. RR 2: 77-78, 81, 87.

**D. Conclusion**

The express language of section 64.012(a)(1) did not require the State to prove that Appellant’s provisional ballot was included in the final vote tally in order to convict her of illegal voting. *See* TEX. ELEC. CODE § 64.012(a)(1); *see also Lebo v. State*, 90 S.W.3d 324 (Tex. Crim. App. 2002) (statutory interpretation begins with statute’s plain language). Appellant voted by expressing her candidate preferences

when she received a PIN and cast her ballot on an electronic voting machine. *See* BLACK’S LAW DICT. (10th ed. 2014) (defining “vote” as “[t]he expression of one’s preference or opinion in a meeting or election by ballot, show of hands, or other type of communication”). The Election Code provides no defense to a prosecution for illegal voting if election officials discover a person’s ineligibility to vote before counting her ballot. *See* TEX. ELEC. CODE § 64.012. Other Election Code sections using the noun “vote” to discuss procedures occurring after tallying do not mandate interpreting the verb “vote” in section 64.012(a)(1) to include only ballots that are ultimately counted. The favorable evidence at trial was sufficient to allow the trial court to find beyond a reasonable doubt that Appellant voted in the general election on November 8, 2016.

#### **IV. HAVA Does Not Preempt States From Criminalizing Submission of Provisional Ballots by a Person Who Knows She Is Ineligible to Vote**

According to Appellant, interpreting section 64.012(a)(1) to criminalize her conduct of casting an uncounted provisional ballot conflicts with HAVA; therefore, HAVA preempts section 64.012(a)(1). *See* Motion at 16-20. She argues that HAVA permits people like her “who believe they are eligible to vote to cast a provisional ballot, even when their belief turns out to be incorrect.” *Id.* at 16.

## **A. HAVA**

Congress sought to protect the right to vote by adopting the provisional voting section of HAVA. *See* 52 U.S.C.A. § 21082(a); *Common Cause Ga. v. Kemp*, 347 F.Supp. 3d 1270, 1292 (N.D. Ga. 2018). HAVA created a system for provisional balloting to alleviate problems of voters being turned away from the polls because election workers could not find their names on the list of qualified voters. *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 569 (6th Cir. 2004). The Act establishes a clear right to submit a provisional ballot if an individual attests to her eligibility. *See* 52 U.S.C.A. § 21082(a).

## **B. HAVA Does Not Preempt Section 64.012(a)(1)**

HAVA ensures that anyone who *believes they are eligible* to vote is given a provisional ballot if their name does not appear on the list of qualified voters. *See* 52 U.S.C.A. § 21082(a). Throughout her arguments regarding HAVA conflict and preemption, Appellant refers to individuals casting provisional ballots when they *believe* they are eligible to vote, are *mistaken* about their eligibility, or *do not know* they are ineligible to vote. *See* Motion at 1, 3, 10, 17-19. Neither the language of section 64.012(a)(1) nor this Court's interpretation of it criminalizes a *mistaken* belief of voter eligibility. *See* TEX. ELEC. CODE § 64.012(a)(1); *Mason*, 598 S.W.3d at 774-79. Rather, section 64.012(a)(1) required the State to prove, and the trial court to find, beyond a reasonable doubt that Appellant *knew she was not eligible to vote*

yet did so anyway. *See* TEX. ELEC. CODE § 64.012(a)(1). Appellant attempts to use HAVA as a shield allowing her to falsely attest to her eligibility to vote and to then vote with impunity. The fact that a person cannot be refused a provisional ballot if she otherwise complies with HAVA by attesting to her eligibility to vote must not be equated with allowing a person who *knows* she is ineligible to vote to falsely attest to her eligibility and to cast a provisional ballot without consequence.

Neither HAVA, nor section 64.012(a)(1), nor this Court's opinion contemplates criminal prosecution of individuals who are mistaken in good faith about their eligibility to vote. And, nothing in HAVA prevents the State from prosecuting an individual who attests that she is eligible to vote and who votes when she *knows* she is ineligible to do so. There is no conflict between HAVA's provisional ballot rules and the illegal-voting offense defined by section 64.012(a)(1). Appellant's attempt to sound the alarm that tens of thousands of Texans who mistakenly or erroneously submit provisional ballots will be subjected to the possibility of felony prosecution is unwarranted. *See* Motion at 16.

### **C. Conclusion**

Appellant does not even fall within the group of people whom she claims HAVA is designed to protect. Her conviction for voting in an election when she *knew* she was not eligible to vote does not run afoul of HAVA in any way. Nothing in HAVA's provisional voting scheme exempts from criminal responsibility persons

like Appellant who affirm their eligibility to vote when they *know* they are not eligible due to a felony conviction and continuing supervision. *See generally* 52 U.S.C.A. § 21082.

**Prayer**

The State prays that this Court deny Appellant's Motion for En Banc Reconsideration.

Respectfully submitted,

SHAREN WILSON  
Criminal District Attorney  
Tarrant County, Texas

JOSEPH W. SPENCE  
Assistant Criminal District Attorney  
Chief, Post-Conviction

/s/ Helena F. Faulkner  
HELENA F. FAULKNER  
Assistant Criminal District Attorney  
State Bar No. 06855600  
401 W. Belknap  
Fort Worth, Texas 76196-0201  
(817) 884-1687  
FAX (817) 884-1672  
[coaappellatealerts@tarrantcountytexas.gov](mailto:coaappellatealerts@tarrantcountytexas.gov)

**Certificate of Compliance**

The total number of words in this State's Motion for Rehearing is 4,331 words as determined by the word-count feature of Microsoft Office Word 2016.

/s/ Helena F. Faulkner  
HELENA F. FAULKNER

## **Certificate of Service**

On July 6, 2020, the State's Response to Motion for En Banc Reconsideration was e-served on Appellant's counsel:

Thomas Buser-Clancy, [tbuser-clancy@aclutx.org](mailto:tbuser-clancy@aclutx.org)

Andre Segura, [asegura@aclutx.org](mailto:asegura@aclutx.org)

Alison Grinter, [alisingrinter@gmail.com](mailto:alisingrinter@gmail.com)

Kim T. Cole, [kcole@kcolelaw.com](mailto:kcole@kcolelaw.com)

Rebecca Harrison Stevens, [beth@texascivilrightsproject.org](mailto:beth@texascivilrightsproject.org)

Emma Hilbert, [emma@texascivilrightsproject.org](mailto:emma@texascivilrightsproject.org)

Hani Mirza, [hani@texascivilrightsproject.org](mailto:hani@texascivilrightsproject.org)

Sophia Lin Lakin, [slakin@aclu.org](mailto:slakin@aclu.org)

Dale E. Ho, [dho@aclu.org](mailto:dho@aclu.org)

/s/ Helena F. Faulkner  
HELENA F. FAULKNER

### **Automated Certificate of eService**

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Haley Little on behalf of Helena Faulkner  
Bar No. 06855600  
hmlittle@tarrantcountytx.gov  
Envelope ID: 48657878  
Status as of 12/8/2020 11:22 AM CST

Associated Case Party: Crystal Mason

<b>Name</b>	<b>BarNumber</b>	<b>Email</b>	<b>TimestampSubmitted</b>	<b>Status</b>
Thomas Buser-Clancy	24078344	tbuser-clancy@aclutx.org	12/4/2020 3:42:09 PM	SENT
Savannah Kumar	24120098	skumar@aclutx.org	12/4/2020 3:42:09 PM	SENT
Alison Grinter		alisongrinter@gmail.com	12/4/2020 3:42:09 PM	SENT
Emma Hilbert		emma@texascivilrightsproject.org	12/4/2020 3:42:09 PM	SENT
Hani Mirza		hani@texascivilrightsproject.org	12/4/2020 3:42:09 PM	SENT
Sophia LinLakin		slakin@aclu.org	12/4/2020 3:42:09 PM	SENT
Kim T.Cole		kcole@kcolelaw.com	12/4/2020 3:42:09 PM	SENT
Dale E.Ho		dho@aclu.org	12/4/2020 3:42:09 PM	SENT
Andre Segura		asegura@aclutx.org	12/4/2020 3:42:09 PM	SENT